



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 29, 1994

Ms. Nancy O'Neill
Office of the General Counsel
Texas Department of Protective and
Regulatory Services
P.O. Box 149030
Austin, Texas 78714-9030

OR94-209

Dear Ms. O'Neill:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 25433.

The Texas Department of Protective and Regulatory Services (the "department") received an open records request for the following information:

A copy of the DPRS report that explains the circumstances of the death of [a named child] at the Wind Crest Nursing Center in Copperas Cove and the findings of the state investigation into his death.

You explain that the department has not yet received the results of the Texas Department of Human Services' investigation into the alleged "deficiencies" that resulted in the child's death at the referenced nursing home.¹ However, you have submitted to this office as responsive to the request a report that the child's caseworker prepared regarding the death, with the following attachments: a statement from the child's doctor detailing the child's medical condition, a nurse's notes on the child's condition, a "Discharge Summary" that a physician prepared after the child's death, and the Department of Human Services' "Statement of Deficiencies and Plan of Correction" addressed to the referenced nursing home. You contend that section 34.08 of the Family Code makes the requested records

¹The department therefore need not comply with this aspect of the request. See Attorney General Opinion JM-48 (1983) at 2 (stating that Open Records Act does not require governmental body to comply with standing request for information to be collected in future).

confidential and that the department therefore must withhold them pursuant to section 552.101 of the Government Code.

Section 552.101 of the act protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Chapter 34 of the Family Code concerns investigations of reports of abuse or neglect of a child. See Fam. Code § 34.012. Section 34.08(a) of the Family Code provides:

Except as provided in Subsections (b) and (c) of this section, the reports, records, and working papers *used or developed in an investigation made under this chapter* are confidential and may be disclosed only for purposes consistent with the purposes of this code under regulations adopted by the investigating agency. [Emphasis added.]

All of the records you have submitted to this office for review pertain to the medical complications that contributed to the child's death and the manner in which the nursing home medical staff responded to the child's condition. These records contain no allegation that the child's death resulted from either abuse or neglect. We therefore do not believe that the department "used or developed" these records "in an investigation made under" chapter 34 of the Family Code. Consequently, we conclude that section 34.08 does not apply to these records.

However, this does not end our discussion of section 552.101 of the Government Code. Although the attorney general ordinarily will not raise an exception that might apply but that the governmental body has failed to claim, see Open Records Decision No. 325 (1982) at 1, we will raise other statutory law that makes information confidential because the improper release of confidential information constitutes a misdemeanor. See Government Code § 552.352. The Texas Medical Practice Act, V.T.C.S. article 4495b, provides:

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

V.T.C.S. art. 4495b, § 5.08(b). Several of the documents at issue are clearly confidential under this provision; consequently, the department must withhold the physician's "Medical Statement," the nurse's notes, and the "Discharge Summary" pursuant to article 4495b. See Open Records Decision No. 324 (1982) at 2 (medical records created by individual "under the supervision" of a physician confidential under article 4495b).

However, because the remaining documents do not constitute "medical records" for purposes of article 4495b, the department must release these records in their entirety.²

Because case law and prior published open records decisions resolve your request, we are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Kymberly K. Oltrogge
Assistant Attorney General
Open Government Section

KKO/RWP/rho

Ref.: ID# 25433

Enclosures: Marked documents

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(w/o enclosures)

²Unlike confidentiality under section 5.08(b) of the Texas Medical Practice Act, which does not lapse upon the death of the patient, common-law privacy protects medical information not coming within the scope of article 4495b only during the life of the patient. Attorney General Opinion JM-229 (1984) at 3-4. Thus, we need not determine here the extent to which the medical information contained in these records otherwise would have come under the protection of common-law privacy.